Filed 5/18/10 P. v. Millman CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID MILLMAN, Defendant and Appellant.	B215078 (Los Angeles County Super. Ct. No. NA079288)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jesus Rodriguez, Judge. Affirmed.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnson and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * *

Appellant David Millman was convicted of one count of criminal threats (Pen. Code, § 422), with an enhancement for a prior serious felony conviction (§ 667, subd. (a)(1)).[1] He contends that (1) there is no substantial evidence that he violated section 422, and (2) the trial court should have instructed on attempted criminal threats as a lesser included offense. We find no merit in the contentions and affirm.

PROCEDURAL HISTORY

The jury found that appellant committed the crime of criminal threats, a serious felony, against Raul Delacruz on April 18, 2008. As to prior offenses, the information alleged (1) one prior strike, a robbery in 1996; (2) three prior convictions, the 1996 robbery and two offenses in 2001, for the purpose of section 667.5, subdivision (b); and (3) a current conviction of a serious felony with a prior conviction of a serious felony, for the purpose of section 667, subdivision (a)(1).[2]

After the guilty verdict, appellant admitted the prior convictions. The trial court refused to reduce the offense to a misdemeanor, but it struck the prior strike conviction and sentenced appellant as a first strike offender. It imposed a seven-year prison sentence, composed of the two-year middle term for the section 422 violation and a five-year enhancement under section 667, subdivision (a)(1).[3]

---

[1] Subsequent statutory references are to the Penal Code unless otherwise stated.

[2] The jury found appellant not guilty on counts 1 through 3 of the four-count information. Those counts alleged first degree burglary, criminal threats, and assault with a deadly weapon, a baseball bat, on John Cuomo on August 7, 2008.

[3] Appellant's opening brief raised an issue regarding a section 667.5, subdivision (b) enhancement that was imposed and stayed. The trial court struck that enhancement while the appeal was pending. The parties agree that the issue that was raised about it in the opening brief is moot.

DISCUSSION

1. Sufficiency of the Evidence of Criminal Threats

Section 422 outlaws threatening to commit a crime against another person that makes that person fear for his or her safety. It sets forth the punishment for "[a]ny person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety. . . ." (*Ibid.*)

Appellant contends that there is no substantial evidence to support his conviction for violating section 422. We summarize the evidence, omitting the evidence for the counts on which appellant was acquitted. Because of the nature of the issue, we do not edit appellant's words.

A. The Testimony of Delacruz

In late September 2006, Raul Delacruz moved into his girlfriend's apartment in San Pedro. His girlfriend moved out in late December 2006, but he continued to live in the apartment. It was one of four apartment units in a building owned by appellant's parents, Gordon and Barbara Millman. We will refer to appellant's parents by their first names to avoid confusion, intending no disrespect. Delacruz had Gordon's approval to take over the rental agreement and remain in the apartment on a month-to-month basis.

The building had two residential units on the first floor and two on the second floor. The first floor apartments sat over garages and could be reached via a staircase that led up from the sidewalk. Delacruz and a woman named Robyn Brewer lived in the two first floor apartments. Appellant and a man named John Cuomo lived in the two second story units. Appellant was the building's property manager. There was roof access near his apartment that enabled him to reach the skylight of Delacruz's apartment.

In late 2006, around the time Delacruz's girlfriend moved out, Delacruz began to complain about problems with his apartment, such as bad plumbing and water damage. The problems were not fixed at that time, but Delacruz received an eviction notice. When he went to court in early 2007, the judge ruled in his favor. The problems continued, so he called the "housing department" and the "human health services department." Gordon and Barbara received official notification that the repairs had to be made. Appellant entered the apartment at some point, and Delacruz showed him the problems. Delacruz felt uncomfortable with appellant, as appellant acted as if he did not want Delacruz to live there.

Over time, the repairs were still not made. There were more eviction proceedings, but the judges continued to rule in Delacruz's favor. He refused to leave. He tried to pay the rent, but appellant, Gordon and Barbara refused to accept it. The problems between Delacruz and appellant grew progressively worse. On an unknown date, appellant telephoned friends of Delacruz's and threatened Delacruz. On February 15, 2008, appellant pounded on the skylight of Delacruz's unit and yelled, "[W]hy don't you fucking move out, punk."

The threats that led to the criminal charge occurred on April 18, 2008. Delacruz testified that he came home from work that day during his lunch break because there was supposed to be an inspection by the building's handyman. Delacruz had previously told Gordon that he refused to deal with appellant any more and would not let appellant inside his apartment. When Delacruz opened the door, he was surprised to see appellant, Barbara, and a plumber. Gordon, who was disabled, was at the bottom of the stairs. Delacruz said, "[W]hat's going on. Where is your handyman?" He let the plumber enter, but not appellant or Barbara.

Appellant became angrier and angrier. He yelled, "You got to cut this shit out. You got to stop playing these games." Appellant reminded Delacruz that Delacruz had previously let him inspect the apartment, when Delacruz's "bitch" (girlfriend) was present. Delacruz reminded appellant that the repairs had not been made after two

previous inspections. He said he was not going to deal with appellant if appellant cursed, yelled, and pounded on the window.

Barbara tried to calm appellant down and led him down the stairs to Gordon. As appellant walked down the stairs, he pointed at Delacruz and yelled, "You better watch it. I'm going to get you." The plumber left quickly. Delacruz then allowed Barbara to enter to inspect the apartment. The handyman knocked on the door. Delacruz let him enter as well. He showed the problems to Barbara and the handyman. He explained to Barbara he did not want to deal with appellant, as he did not feel comfortable or safe around him.

After the handyman left, Barbara and Delacruz stood at the doorstep of Delacruz's apartment. Appellant started yelling at Delacruz, while standing on the roof. Appellant reminded Delacruz that he was the property manager. He yelled the following words, which formed the basis of the section 422 charge: "I'm going to fucking kill you. I'm going to rape your mother. . . . I'm going to hunt down your nieces and nephews and fuck them in their asses, you fucking spick." Then, he stormed off.

Delacruz felt stunned and frightened, as appellant had directly threatened his life, and had threatened his family members in a "sick way." Delacruz believed that appellant was capable of carrying out his threats, especially because the threats and harassment had gotten progressively worse.

Barbara went down the stairs. Delacruz went back to work and called the police. He went to the police station after work, but the officer to whom he spoke refused to take a report. Nothing unusual happened when he returned home. Because of his fear, he talked to his friends, purchased a video camera, tried to have friends present during further inspections, and seriously considered purchasing a gun or moving out. He was also concerned because, on a couple of subsequent occasions, he saw appellant looking into his (Delacruz's) window while standing across the street. However, appellant never spoke to him again.

After speaking to the city attorney's office, Delacruz finally made a police report on May 13, 2008, about a month after the incident. He continued to live in the apartment even though he still feared for his safety. He was still living in the apartment at the time

of the trial, January 2009, even though he had received eviction notices in each of the preceding six months.

B. The Testimony of Robyn Brewer

Brewer had lived in the other downstairs unit for 14 or 15 years. She had known appellant and his parents all that time, and never had a problem with them. When she complained about problems with her apartment, repairs were slow, but they eventually were made.

Around noon on April 18, 2008, Brewer was sleeping in her apartment when she was awakened by the yelling voices of appellant and Delacruz. Appellant did a larger share of the yelling. Brewer definitely heard him say, "I'll rape your cousins" and "I'll rape your mom." He also may have mentioned raping Delacruz's aunt. Delacruz was yelling, less loudly, words like, "What are you talking about?"

Once things were quieter, Brewer opened her front door, which was separated from Delacruz's front door by a small landing. Delacruz was standing at his door. Brewer asked him what was "going on," and he asked her if she had heard what appellant said.

C. Testimony by the Plumber

Leonard Olguin, a plumbing contractor, testified that on April 18, 2008, he went to the building at the request of appellant's father, Gordon. He waited at the door of the apartment with appellant's mother, Barbara. Gordon was down the stairs at this time. Delacruz opened the door and stated that he would allow Olguin but not Barbara to enter. Barbara insisted that she wanted to come inside. Appellant came up the stairs to the doorway and asked, "[W]hy don't you let us in." He also told Delacruz, "Show the guy what he has to do to do the job." Appellant and Delacruz then engaged in a shouting match. According to Olguin, "Both of them weren't gentlemen." Barbara tried to be calming. Appellant cursed at Delacruz. Delacruz said, "[Y]ou can't curse at me." Appellant appeared to have a violent temper, and Delacruz did not, but Olguin heard no threats. Olguin grabbed appellant and slowly escorted him downstairs. Appellant said, "I've had it with this guy." Appellant shouted things up the stairs, and Delacruz shouted

things down the stairs. Olguin thought "things could get really ugly," so he told appellant to call him another time and left. Olguin returned to the apartment about a week later, bringing his son as a witness. Delacruz let him inside the apartment, where he accomplished the plumbing job without a problem.

D. Appellant's Testimony

Appellant testified that he moved into the apartment building around October 2007. He managed the building to help his father Gordon, who was elderly and disabled. He was upset that Delacruz complained to Gordon instead of to him about problems with the apartment. He admitted that on one occasion he pounded on the skylight, yelled at Delacruz that the rent was due, and called Delacruz a punk.

Regarding April 18, 2008, appellant testified that he picked up Gordon and brought him to the apartment building. Barbara arrived with Lloyd, the handyman. They all met downstairs at the garage level. Olguin, the plumber, was not there yet. Barbara and Lloyd knocked on the door, but there was no answer. Appellant's father told appellant to stand at the door of the apartment with Barbara. Delacruz opened the door and "freaked out" when he saw appellant. Appellant thought Delacruz was not giving him "a fair chance at being the apartment manager." Delacruz let only the plumber enter. Appellant got angry, raised his voice, and "might" have said "fuck you." The plumber came out, and appellant went down the stairs with him. Appellant talked briefly downstairs with his father. He then went upstairs to his apartment, using a different staircase than the staircase outside of Delacruz's apartment.

When appellant got to the level of his apartment, he went through a little gate and walked onto the roof. He was upset and hurt because he was new at being a property manager and "really wanted to work things out in a professional manner." From his position on the roof, he looked over, saw Delacruz, and yelled and cursed at him for three or four minutes. He did not recall exactly what he said, but it was the type of statements that Delacruz and Brewer indicated in their testimony. Appellant then went into his apartment and played video games. He had no further contact with Delacruz. He was

arrested on August 7 of that year because of the incident in the other counts, and thereafter learned about the charge involving Delacruz.

During his testimony, appellant admitted that he had a felony conviction in 1996 and three felony convictions in 2001, which included a conviction for forgery.

E. Analysis

Appellant maintains that there was no substantial evidence that he violated section 422 "because, under the totality of the circumstances, appellant's intemperate, rude and insolent remarks, made during an angry outburst, lacked the intent that the statements [would] be understood as threats and were so outrageous on their face that no reasonable person would have understood the statements as reasonable threats against the person or his family."

Utilizing the appropriate standard of review (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), we find substantial evidence that appellant violated section 422.

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat . . . was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*); see also 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000 & 2009 supp.) Crimes Against Public Peace and Welfare, § 22.)

Appellant contends there is insufficient evidence that (a) he had the specific intent that Delacruz would take the statements as a threat, (b) the threat was so unequivocal, unconditional, immediate and specific that it conveyed a gravity of purpose and

immediate prospect of execution, and (c) the threat actually caused Delacruz to suffer sustained fear.

Appellant maintains that the facts here are analogous to those of *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*), which found insufficient evidence for a section 422 violation. In *Ricky T.*, the minor was a high school student who left a teacher's classroom to use the restroom, returned to the classroom, and found the door locked. He pounded on the door and may have been hit in the head with the door when the teacher opened it. The minor became angry, cursed at the teacher and threatened him, saying: "I'm going to get you." (*Id.* at p. 1135.) The teacher said he felt physically threatened, but there was no specific threat or further act of aggression. The defendant told the police that he did not intend to sound threatening, but he admitted that he told the teacher he would "kick [his] ass." (*Id.* at p. 1137.)

As *Ricky T.*, recognized, "Section 422 demands that the purported threat be examined 'on its face and under the circumstances in which it was made.' The surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat." (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1137.)

Although, like the minor in *Ricky T.*, appellant never physically assaulted Delacruz, the facts here are very different from those of *Ricky T.* *Ricky T.*'s conclusion was based in part on the absence of prior hostility between the minor and the teacher. (*Ricky T.*, *supra*, 87 Cal.App.4th at p. 1138.) Here, in contrast, there was increasing tension between appellant and Delacruz for months, during an extended landlord/tenant dispute. Appellant had called Delacruz's friends to threaten Delacruz and had pounded on Delacruz's skylight while calling Delacruz a punk. On the day of the incident, after arguing with Delacruz at the apartment, appellant walked away from it while pointing at Delacruz and yelling, "You better watch it. I'm going to get you." A short time later, while Delacruz and appellant's mother were at the door of Delacruz's apartment, appellant stood on the roof and yelled to Delacruz, "I'm going to fucking kill you. I'm going to rape your mother. . . . I'm going to hunt down your nieces and nephews and fuck them in their asses, you fucking spick." Delacruz testified that those words

frightened him so much that he seriously considered moving out or buying a gun. His actions showed that he was frightened, as he spoke to the police that same day and bought a video camera.

Appellant argues that his statements, unaccompanied by any other evidence of aggression, were inherently not credible and therefore could not reasonably have conveyed the requisite gravity of purpose and immediate prospect of execution that would reasonably have caused sustained fear. In essence, appellant asks us to substitute our judgment for the jury's in weighing whether it was reasonable for Delacruz to take appellant's threats seriously. Deciding what appellant's intent was in making his statements was a factual determination for the jury. On appeal, the only question is whether there is substantial evidence to support the verdict. Because there is such evidence, appellant's attack on the sufficiency of the evidence fails.

2. Failure to Instruct on Attempted Criminal Threat as a Lesser Included Offense

Appellant also contends that the trial court should have instructed on the lesser included offense of attempted criminal threat, as there was a reasonable probability that a properly instructed jury would have convicted him of the lesser offense.

"'[T]he trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.' [Citation.]" (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 256.) "On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support. . . . [¶] . . . 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

"[A] defendant properly may be found guilty of attempted criminal threat whenever, acting with the specific intent to commit the offense of criminal threat, the defendant performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action." (*Toledo, supra,* 26 Cal.4th at pp. 230-231.) "[I]n most instances the crime of attempted criminal threat will involve circumstances in which the defendant in fact has engaged in all of the conduct that would support a conviction for

criminal threat, but where the crime of criminal threat has not been completed only because of some fortuity outside the defendant's control or anticipation (for example, because the threat is intercepted or not understood, or because the victim for some reason does not actually suffer the sustained fear that he or she reasonably could have sustained under the circumstances)." (*Id.* at p. 234.)

Appellant contends that the jury could have found that he committed only the lesser included offense, as Delacruz continued to live in the apartment, appellant never attempted to physically assault Delacruz, and appellant never again spoke to Delacruz. In our view, however, this was an "all or nothing" case. Appellant either violated section 422, or he was not guilty of any crime. Because there was no substantial evidence that appellant committed only an attempt to violate section 422, the trial court did not err when it failed to instruct on that lesser offense.

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.